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No.

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VOICE OF AMERICANISM and CALIFORNIA GRADUATE SCHOOL OF THEOLOGY

Petitioners,

vs.

WALTER H. KENDALL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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83pp

QUESTIONS PRESENTED

1. Whether the due process clause of the United States Constitution requires California courts to cease ignoring the fundamental principals of personal jurisdiction ennunciated in *Pennoyer v. Neff.* (Amendments XIV and VII)

2. Whether the California courts' interpretation of its statutory scheme to permit default judgment without trial is repugnant to the due process clause of the United States Constitution. (Amendments XIV, XII, and I)

3. Whether the state courts wrongfully applied the California statutory scheme for service of process in such manner as to permit a $1.2 million dollar judgment to be taken by default against Petitioners in violation of their due process rights to a fair trial. (Amendments XIV, VII and I)

4. Whether the lower state courts' failure to follow California's own statutory scheme to limit unreasonable punitive damage awards violates basic concepts of the due process clause of the United States Constitution, and the specifics of the California code. (Amendments XIV and VII)

LIST OF PARTIES AND RULE 28.1 INFORMATION

The parties to the California Proceedings below were:

Petitioners, VOICE OF AMERICANISM and CALIFORNIA GRADUATE SCHOOL OF THEOLOGY, California corporations; and

Respondents, WALTER H. KENDALL, and 24 other individuals who sued COMMUNITY CHURCHES OF AMERICA as the target defendant on promissory notes, Petitioners having been joined as alter egos of COMMUNITY CHURCHES.

Co-Defendants, COMMUNITY CHURCHES OF AMERICA, INC., CONCORD SENIOR HOUSING FOUNDATION, UNITED COMMUNITY CHURCH, and W. S. McBIRNIE participated in the proceedings that led to the filing of this petition, but each has declined to join in this petition.

Petitioners, VOICE OF AMERICANISM and CALIFORNIA GRADUATE SCHOOL OF THEOLOGY, respectively, maintain and aver that they are independent California corporations, in good standing, and that, as such, they have, respectively, never been an alter ego of the non-petitioning co-defendants, each of the Petitioners having its own respective officers, directors and agents. Petitioner, VOICE OF AMERICANISM, is engaged in patriotic nonprofit radio broadcasting. Petitioner, CALIFORNIA GRADUATE SCHOOL OF THEOLOGY, is a graduate school for the training of Christian ministers. At the default prove-up hearing in this matter, both Petitioners were never linked to the Respondents and were never held to have transacted any business with the Respondents.

There is no evidence in the record that Petitioners ever injured Respondents in any way.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

VOICE OF AMERICANISM and CALIFORNIA GRADUATE SCHOOL OF THEOLOGY,

Petitioners,

vs.

WALTER H. KENDALL, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, VOICE OF AMERICANISM and CALIFORNIA GRADUATE SCHOOL OF THEOLOGY, California corporations, pray that a writ of certiorari issue to review the decision of the Court of Appeal, State of California, Second Appellate District, denying Petitioners' appeal. Petitioners were seeking reversal of a default judgment of the Superior Court of California, for the County of Los Angeles, against them and the non-petitioning co-defendants in the sum of $1,234,045, awarded in the above entitled proceeding by a judge pro tem on May 6, 1985.

JURISDICTION

Petitioners timely moved to vacate the Superior Court default judgment and their motion was denied by a Los Angeles Superior Court judge on July 12, 1985. The California Court of Appeal denied petitioners' timely appeal and affirmed the trial court judgment on January 5, 1987. Thereafter, the California Supreme Court on March 17,1987, denied Petitioners' timely petition for review.

The jurisdiction of this Court is invoked under:

(a) Article 3, Section 2, Clause 2, United States Constitution; and

(b) United States Code, Section 1257(3).

The final order of the California Supreme Court, together with the decisions of the Court of Appeal and Superior Court are attached to this petition as appendices, "A", "D", "G" and "H".

STATUTES INVOLVED

I. Amendment XIV, Section 1, of the United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Amendment I, of the United States Constitution:

> "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ."
>
> (As Applied to the States)

Amendment VII, of the United States Constitution:

> "In suits at common law . . . the right of trial by jury shall be preserved . . ."
>
> (As Applied to the States)

II. California Code of Civil Procedure, Section 410.10:

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States."

California Code of Civil Procedure, Section 410.50:

". . . [t]he court in which an action is pending has jurisdiction over a party from the time summons is served on him as provided by Chapter 4 (commencing with Section 413.10)."

California Code of Civil Procedure, Section 413.30:

". . .[t]he court in which the action is pending may direct that summons be served in a manner which is reasonably calculated to give *actual notice* to the party to be served and that proof of such service be made as prescribed by the court."

(Emphasis supplied).

California Code of Civil Procedure, Section 416.10:

"A Summons may be served on a corporation by delivering a copy of the summons and of the complaint:

(a) To the person designated as agent . . . (statutory agent) . . .

(b) To the president or other head of the corporation, a vice president, a secretary, a treasurer or assistant treasurer, a general manager, or a person *authorized by the corporation* to receive service of process."

(Emphasis supplied);

(c) . . .

(d) . . .

(Inapplicable)

California Code of Civil Procedure, Section 1917:

> "The jurisdiction necessary [to] a judgment. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing when a specific thing is the subject of the judgment."

California Code of Civil Procedure, Section 416.90:

> "A summons may be served on a person not otherwise specified in this article by delivering a copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process."

III. California Civil Code, Section 3274 (Species of Relief)

> "As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code."

California Civil Code, Section 3294 (Exemplary Damages)

> "3294 [When permitted] (a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
>
> "(b) . . . (W)ith respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

STATEMENT OF THE CASE

This is a petition to curb California's continuing efforts to clear its crowded court calendars with default judgments taken in direct violation of the due process requirements of personal jurisdiction set forth in the Constitution and defined by the landmark *Pennoyer v. Neff* decision.

Plaintiffs sued the target defendant, Community Churches of America, a California corporation, and its president, W. S. McBirnie, in Los Angeles Superior Court, to recover $165,825.63 due on promissory notes executed by the corporation in their favor. The complaint requested exemplary damages of $5 million against McBirnie and alleged as an afterthought that these petitioning defendants were, somehow, alter-egos of Community Churches and McBirnie. McBirnie was not an officer, director, or agent of the respective petitioning corporations.

Summons and complaint were delivered to a receptionist in an office formerly occupied by an attorney, who, without agreement, authorization, or ratification by Petitioners, had once allegedly represented to plaintiffs' counsel that he had authority to accept service of process on behalf of all defendants. Plaintiffs' counsel had earlier delivered process to the attorney during settlement negotiations involving the target defendant.

During each stage of the state court proceedings, Petitioners denied that the attorney had authority to accept service of process and they alleged that he had not been their attorney at the dates of both deliveries. In fact, Petitioner, VOICE OF AMERICANISM, has been represented by only one attorney in its entire history, counsel of record herein, and he clearly was not the enterprising attorney who bragged to Plaintiff's counsel that he represented Petitioners as well as the target defendants.

There is no evidence that Petitioners ever consented to, or had knowledge of, this purported service of process to collect a debt owed by a stranger. Petitioners were not parties to, or guarantors of, any of the promissory notes.

Three articles concerning the pending litigation appeared in two Los Angeles County newspapers prior to the second delivery, but, the only rebuttal comment was made by McBirnie. These petitioners were factually unaware of the articles.

The attorney asserted to Plaintiffs' counsel that Petitioners had not been properly served because he had no authorization to accept service on behalf of Petitioners. Plaintiffs' counsel ignored the assertion and entered default against all defendants, including Petitioners.

The default enabled Plaintiffs to write their own ticket at the prove-up hearing, and, in so doing, Petitioners received an invitation to eventual bankruptcy in the form of the default judgment for $1,234,045, including:

(a) $165,825.63, on the notes;
(b) $55,109.32, interest;
(c) $12,842.05, attorneys fees;
(d) $268.00, costs; and
(e) $1,000,000, exemplary damages.

Petitioners appealed on grounds that the judgment was void for lack of personal jurisdiction because they had not been personally or constructively served with process. The California appellate courts continued to run roughshod over the fundamental rights of Petitioners.

The California Court of Appeal affirmed on the erroneous factual assumption that Petitioners had:

(a) ostensibly authorized the attorney to accept service of process on their behalf; and,

(b) actual knowledge of the litigation because of the newspaper articles.

The Appellate Court justified its decision by stating that California's modernized procedural rules regarding service of process and obtaining default judgments are designed to clear the clogged court calendars and streamline the administration of justice.

The California Supreme Court denied review without comment.

HOW THE FEDERAL QUESTION WAS PRESENTED

Petitioners argued before the California's Court of Appeal and Supreme Court that the due process clause of the Fourteenth Amendment requires that a state court must have jurisdiction over the Petitioners before it can impose a personal obligation or duty against the Petitioners. Petitioners relied on the authority of *Pennoyer v. Neff*, 95 U.S. 714, 732-733 (1878), and *Kulko v. California Superior Court*, 434 U.S. 84, 91 (1978).

Petitioners also argued that the exemplary damage award of $1 million assessed against them, as friends of the target defendant, violated California law and their constitutionally guaranteed right to a fair trial.

REASONS TO GRANT THE WRIT

I

THE REFUSAL OF THE CALIFORNIA COURTS TO FOLLOW CONSTITUTIONALLY MANDATED RULES FOR SECURING PERSONAL JURISDICTION RAISES IMPORTANT ISSUES CONCERNING THE RIGHTS OF STATES TO AVOID THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

This case presents monumentally important issues regarding application of the due process clause of the Fourteenth Amendment, United States Constitution, to the California statutory scheme for personal jurisdiction as applied to Petitioners. Resolution of these issues will have direct effect on the ability of states to further encroach on an individual's right to judicial due process under the guise of cutting clogged court calendars.

It is time for this honorable Court to remind the states that the principles of *Pennoyer v. Neff* have not been abandoned, and that this Court will not tolerate any further disregarding of its mandated guarantees of judicial due process.

It is hornbook law that to impose a personal obligation or duty in favor of the Plaintiffs-Respondents, the California court must have jurisdiction over the persons of the Petitioners. *Pennoyer v. Neff*, 95 U.S. 714, 732-733 (1878) and *Kulko v. California Superior Court*, 434 U.S. 84, 91 (1978). This basic tenant is built into the California statutory scheme. *See* California Code of Civil Procedure, Section 1917.

The facts contained in the record on appeal illustrate that in no way did Petitioners either submit to the jurisdiction of the

Los Angeles County Superior Court or become subject to the court's jurisdiction by way of valid service of summons and complaint upon them by Plaintiffs-Respondents. Petitioners never came to court and they were not brought to court.

The California Code of Civil Procedure sets forth valid service of process. A California court may exercise jurisdiction on any basis not inconsistent with the Constitutions of California and the United States. Code of Civil Procedure, Section 410.50. A California court has jurisdiction over a party from the time summons is served on him as provided by the Code. Code of Civil Procedure, Section 413.10.

The Code specifically details the required method of service on a corporation, including service on its statutory agent or on an officer or on a designated agent. No such service was made on Petitioners in this matter. The attorney who received the process was not authorized to accept process on behalf of Petitioners and he was not an officer or agent of petitioners. California Code of Civil Procedure, Section 416.10.

The requirement of personal delivery is stressed elsewhere in the Code, with the same mandate that the person accepting service must be authorized to accept such service. The receptionist at the attorney's prior office was clearly not authorized by petitioners, or even the attorney, to accept service on behalf of Petitioners. California Code of Civil Procedure Section 416.90.

The Appellate Court ignored a long line of California cases which stress the indispensable requirement of personal service as a prerequisite to a court's jurisdiction. *Beecher v. Wallace*, 381 F.2d 372 (9th Cir. 1967). The Appellate Court in this matter also ignored California case law which stresses the due process aspects of proper service. In *Adult v. Dinner For Two, Inc.*, 27 Cal.App.3d 145 (1982), the court stated that state court jurisdiction over a defendant who has not made a general appearance is dependent on three factors: (a) jurisdiction of the state in a Constitutional sense, (b) due process in the form

of adequate notice; and (c) compliance with the state's statutory requirements for service of process.

The Appellate Court found that the attorney had "ostensible authority" to accept service on behalf of Petitioners because of the attorney's prior representations that he was so authorized. But, California follows the majority agency rule that ostensible authority must be created by the principals and not by the agent. *Warner Bros. Recording, Inc. v. Golden West Music Sales*, 36 Cal.App.3d 1012, 1018-1019 (1974) and *Pasadena Medi-Center Associates v. Superior Court*, 9 Cal.3d 773, 777 (1973) (citing California Civil Code, Section 2317).

There was no evidence in the record to support the Court of Appeal's finding of an agency relationship between the attorney and petitioners. The Court also justified its finding by implying that the attorney should have taken some affirmative action upon receipt of process. But, California courts have repeatedly held that a defendant is under no duty to act upon a defectively served summons. *Slaughter v. Legal Process & Courier Service*, 162 Cal.App.3d 1236 (1984).

The Court of Appeal also indicated that Petitioners had actual knowledge of the litigation even though, again, there was no evidence in the record to support his inference. And, in any event, in California the requirement of notice is not satisfied by actual knowledge without notification conforming to statutory requirements, methods of service must by strictly construed, and a California court does not acquire jurisdiction where personal service is asserted but did not take place. *Slaughter, supra.*

The Court of Appeals found the "ostensible authority" in the newspaper article and quotes by Defendant McBurnie that Community Churches owed the money. Even if phantom newspaper accounts can be construed as an adoptive admission, Petitioners were not even mentioned in the article. And, in California to find an adoptive admission, the statement must be made with knowledge of the content in the presence

of the party under circumstances that would normally call for a response if the statement were untrue. *Estate of Neilson*, 57 Cal.2d 733 (1962).

There is no evidence in the record that Petitioners even knew the attorney or his receptionist. To create agency solely through the representation of the presumed agent would constitute "boot strap" authority even against the will of the principal. *Ernst v. Searle*, 218 Cal. 233, 236 (1933).

Unless this Court grants this Writ, a dangerous precedent will be allowed to stand thereby permitting the California court to trample on Petitioners' Constitutional rights to due process. The Court of Appeals let stand a Draconian and inequitable judgment by labeling Petitioners' appeal an exercise in hypertechnicalities. It is respectfully submitted that Petitioners' request to observe the basic requirements of due process is anything but hypertechnical.

II

THE REFUSAL OF THE CALIFORNIA COURTS TO PROPERLY APPLY THE STATE'S MANDATED RULES TO LIMIT UNREASONABLE PUNITIVE DAMAGE AWARDS VIOLATES BASIC CONCEPTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

This case also presents critical issues regarding application of the due process clause of the Fourteenth Amendment, United States Constitution, to protect innocent citizens from Draconian punitive damage awards after default judgment in state courts. The refusal of the California courts to properly apply the state's mandated rules to limit unreasonable punitive damage judgments, in effect, violated Petitioners' basic rights to judicial due process.

It is hornbook law that punitive damages can be justified only as retribution or as a deterent. *Green v. Wolf Corp.*, 406 F.2d 29 (CA2d-NY), *cert. den.* 395 U.S. 977 (1968). California follows the majority rule and holds that punitive and exemplary damages, unfavored by law, should be granted with the greatest of caution and only in the clearest of cases, and, when allowable, the amount to be awarded must bear a reasonable relationship to actual damages suffered. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689 (1967)

In this matter, Plaintiffs requested punitive damages against Defendant McBirnie by alleging that he fraudulently enduced Plaintiffs to loan him money when he had no intent to pay it back. Petitioners, however, were never parties to the loans and were not makers or guarantors of the promissory notes.

The right to recover punitive damages in California arises solely by virtue of Section 3294 of the California Civil Code. *Fitzpatrick v. Clark*, 26 Cal.App.2d 710 (1956). This section defines fraud as an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property. California Civil Code, Section 3294.

There is nothing in the record to indicate that Petitioners ever knew the Plaintiffs or even knew of the loans to the target defendant. Accordingly, there is no rationale for punishing the innocent Petitioners for the alleged wrongs of another.

It is submitted that the punitive damage award of $1 million violates Petitioners' rights to due process guaranteed by the Fourteenth Amendment. The default hearing record fails to disclose any relationship between the size of the puntivie damage award to the actual damage judgment.

Finally, to permit any state to justify an inequitable judgment upon unauthorized puffing of an ambitious stranger, on behalf of any non-consenting innocent offends all of the basic rights of the Due Process Clause.

CONCLUSION

For these succinct reasons, this Petition for Certiorari should be granted.

DATED: June 12, 1987.

Respectfully submitted,

MOTON HOLT
RAYMOND TREMAINE

Attorneys for Petitioners

APPENDIX A

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 1, No. B015508

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
MAR 17 1987
Laurence P. Gill, Clerk

Deputy

KENDALL et al., Respondents,

v.

McBIRNIE et al., Appellants.

Appellants' petitions for review DENIED.

LUCAS
Chief Justice

APPENDIX B

SUPREME COURT
FILED
FEB 11 1987
Laurence P. Gill, Clerk

Deputy

2nd Civil No.
B 0 1 5 5 0 8

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WALTER H. KENDALL, et al.,
Plaintiffs and Respondents,
vs.
W. S. McBIRNIE, et al.,
Defendants and Appellants.

L.A.S.C. No.
NCC 14282G

APPEAL FROM
COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR REVIEW

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PETITION FOR REHEARING DENIED DATED: JANUARY 29, 1987 B-13

(Proof of Service Form omitted in printing.)

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PETITION FOR REVIEW

ON APPEAL FROM THE DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION I

The petitioner and appellant Voice of Americanism sometimes referred to as "First Appellant", hereby petitions the Supreme Court of California for a hearing to review the decision of the Appellate court in the above entitled action.

The hearing is necessary on the grounds that the decision of the appellate court:

Creates a lack of uniformity of decision and is not consistent with the cited authorities and this court's ruling is necessary to secure uniformity of decision covering important questions of law and fact.

The Opinion of the Court of Appeal showing the date of filing is enclosed herewith as is a copy of the order of the Court of Appeal denying the petition for rehearing.

Therefore this petitioner submits the following statement of issues and argument in support of this petition.

STATEMENT OF THE CASE

The defendant/appellant, Community Churches of America, was sued by creditors holding its promissory notes. The plaintiffs (note holders) filed this action against the maker of the notes, Dr. W. S. McBirnie and all others they could find who had any connection with Dr. McBirnie. This defendant was made a party because Dr. McBirnie was the "News Analyst" (without pay) of its radio broadcasting activities. The United Community Church was named because he was its pastor. The good doctor has no ownership or managerial

authority from either of the defendants in spite of which facts they were named defendants on an alter-ego theory.

The order of the trial court denying the defendant's motion to vacate the default judgment as void on its face, pursuant to the Code of Civil Procedure, Section 473, was affirmed.

THE ISSUES PRESENTED FOR REVIEW

1. Does the decision of the Appellate Court and denial of the petition for rehearing show errors and a lack of understanding of the undisputed facts result in an improper decision.

2. Appellant incorporates all the points and authorities submitted by Co-Appellants in their respective briefs and petitions herein.

3. May there be jurisdiction in the trial court when no service was made on the defendant?

4. Was the judgment void for lack of personal service?

5. Can ostensible authority be created without the knowledge or consent of the principal.

6. Was the alter-ego theory properly applied to hold this defendant liable on a contract it had no knowledge of.

7. Equity and justice demand that Appellant not be deprived of its day in court.

ARGUMENT

The Appellate Court in its opinion made so many errors in referring to the facts that it's apparent the court did not understand the facts presented. It simply repeated any erroneous statements made by the trial judge. A review of the opinion discloses errors as follows:

A. The opinion is in error in stating this appealing defendant was one of a group of corporations and one individual who borrowed money from the plaintiffs. There is no evidence that the Voice of Americanism borrowed any money from the plaintiffs or that it received any money from the plaintiffs, directly or indirectly (Opinion, page 2).

B. The statement is made by the court that the "Defendants do not dispute that they owe plaintiffs the money." (Opinion, page 2). This was a fatal misstatement. Voice of Americanism most urgently disputes it and is hereby seeking its first opportunity to have a trial of the facts that it may do so. The plaintiffs never made demand, over several years, on Voice of Americanism, except in the instant suit in which it was not served. The complaint was filed April 13, 1984. The notes were mostly dated 1975-1982.

C. In support of its contention that service on Mr. Garcin, who represented all the defendants (including Voice of Americanism) the court cites a newspaper article and stated it quoted the "defendants" about this case. There was no such evidence. The only evidence is to the contrary. See Declaration of Raymond Tremaine, the President of Voice of Americanism (Clerk's Transcript, page 390-392) and (Reporter's Transcript, page 19 and page 30). It is suggested that this court would make new law to hold that a party is bound by an article in a newspaper of a city in which the president of the organization does not reside or read that paper.

D. The court stated (Opinion, page 3) that the receptionist in the building where Mr. Garcin's office was formerly located had been authorized by Mr. Garcin to accept service. Not so, and no evidence to that effect, but rather a denial on her part. (Clerk's transcript, page 377) Declaration of Lucy McWilliams and of Robert W.

Garcin (Clerk's transcript, page 344 and 561).

E. On page 3 of the Opinion, the opinion reads that "Defendants then did not wait over eight months to file a motion to quash service of summons".
I fail to see how you can be disciplined for waiting eight months to file suit when you do not know what happened.

F. Page 3 of the Opinion contains the following passage: "At the hearing all defendants were represented by Garcin." Apparently the court assumes that if an attorney says he represents you, he does, even if you've never retained him to be your attorney, never said that he did, and did not know he ever made such a representation. Plaintiffs' secretary said Garcin told her she was authorized to accept service for "most defendants" (Clerk's transcript, page 519).

G. On page 5 of the Opinion, the court states the service would be good "if actual notice has been received by the defendant". The record here is clear that the defendant, Voice of Americanism, did not receive actual notice.
As President of this defendant, I have standing instructions to the employees of the Voice of Americanism that if any legal process was brought to the office, I was to be informed immediately. I have been assured none was ever received and that plaintiffs have not contended that any such service was attempted.
The Court cites, with approval, that legal technicalities should not "prejudice the right of the defendant to proper notice of court proceedings" (Opinion, page 5).
Here this defendant had no notice of the court proceeding until I heard the case was being tried that day in Glendale. I rushed to the courthouse in Glendale to learn a default had been entered against the Voice of Americanism and all other defendants and that the default trial had just been concluded. Mr. Troupis,

counsel for the plaintiffs, was still in the courthouse but was unwilling to do anything to permit Voice of Americanism to be heard.

H. In page 7 of the Opinion, the court cites the case of Warner Bros. Records where the attorney had ostensible authority to accept service. Here Mr. Garcin had no ostensible authority. Even if he had said he had, it is submitted, he can't have ostensible authority merely by his own statement. In other words, he can't give himself ostensible authority without the knowledge or consent of the defendant. The denial of authority (Declaration of Raymond Tremaine) (Clerk's Transcript, page 390) has not been refuted by plaintiffs.

I. In spite of the record, this court states in its opinion, page 7, that "all the defendants received actual notice and the receptionist was specifically authorized".

There is no evidence to support this statement and, as here stated before, actual notice is not claimed unless notice to Mr. Garcin can be claimed to be notice to a defendant who had never retained him.

J. In page 7 of the Opinion, it is stated that "the defendants discussed the lawsuit in newspaper articles". Again, the statement is made contrary to the evidence, and assuming this to be true, it does not prove this defendant was served. Surely the court does not mean to tell us that a defendant who has not been served is obliged to answer because of reading a newspaper article that a case had been filed, especially when the defendant was misnamed in the complaint as "Center for American Studies, Voice of Americanism Department." Plaintiffs did not even know the name of the defendant. There is no proof that this defendant ever discussed this case in a newspaper article. If it had, so what! That is no proof of proper service.

Vici Smith, the newspaper reporter for the Glendale

News Press who interviewed Mr. Garcin, quoted him as advising her he was the attorney for Community Churches of America and United Community Church. He did not claim to represent Voice of Americanism. This failure to claim Voice of Americanism as a client is significant (Clerk's transcript, page 242).

K. In page 8 of the Opinion, the court states regarding the plaintiffs' claim "that defendants admit is valid and of which they had actual notice."

Voice of Americanism never admitted the plaintiffs' claim was valid. It did not know whether it was valid or not against the real party in interest. It was not a party to the dealings and the fact that its' news analyst was also the President and a Pastor of Community Churches of America is no proof of an admission of liability on the part of Voice of Americanism.

2. As stated in the statement of issues this appellant joins in the petition herein by all other Co-Appellants and incorporates the grounds of points and authorities raised by Co-Appellants herein.

3. The court has jurisdiction over a party from the time summons is served on him as provided by the court (CCP Section 410.15).

4. Service is generally made by personal delivery with a copy of Summons and Complaint (see Section 415.10 CCP), however, in lieu of personal delivery a copy of the Summons and Complaint to the person to be served may be served by leaving a copy of the Summons and Complaint during usual office hours in the office with the person who is apparently in charge thereof and by thereafter mailing a copy of the Summons and of the Complaint by first class mail, postage prepaid, to the person to be served at the place where a copy of the Summons and of the Complaint were left (CCP Section 415.20 paragraph unnumbered). No copy was left with

anyone in Mr. Garcin's office and no copy has been shown to be sent by mail to his office at anytime. This basic tenant of the law is supported by the case of *Pennoyer vs. Neff* (1878) 95 U.S. 714, 732-733 and the case of *Kulko vs. California Superior Court* (1978) 434 U.S. 84, 91.

5. Ostensible authority requires the conduct of a principal and not the conduct of an "Ostensible agent". The law in California is amply clear that ostensible agency cannot be established by the representations or the conduct of the purported agent; the statement or acts of the principal must be such as to cause the third party to believe that the agency exists. The law stated may be found in *Lee v. Helmco, Inc.*);062) (*sic)* 199 Cal.App.2d 820, 834.

It is submitted that Appellant Court on the one hand misstates the record on appeal, and on the other hand misapplies the law cited in its opinion when it concludes that Garcin had ostensible authority to accept service.

6. The alter-ego theory essential to the plaintiff's recovery was not properly applied in the pending action. Mr. Witkin in his *Summary of California Law*; Corporations, Volume 5, Section 5, page 4317 states:

"When a corporation is used by an individual or individuals, or by another corporation, to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the acts as if they were done by the individuals themselves or by the controlling corporation." In the instant case, Voice of Americanism was not used to perpetuate, circumvent or accomplish anything. It was not involved in the note making by the defendant, Community Churches of America, with which it had no legal or controlling position. No proof of such was introduced at the trial.

In the case of *Minifie v. Rowley* (1921), 187 Cal. 481,

202 P. 673, the court stated that to have an alter-ego relationship, it must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; Second, that the facts are such that an adherance to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. No such situation here existed. The plaintiffs are here contending that Dr. McBirnie was the alter-ego of the appellant, Voice of Americanism, but never submitted any proof that he used Voice of Americanism to perpetuate any fraud, circumvent statutes or accomplish some other wrongful or inequitable purpose. In fact, his only connection was that of "news analyst". He was not involved with the direction or operations of this appellant and had no authority to do so if he had tried.

7. Without any knowledge that it was supposed to be served with Summons and Complaint, a default judgment was rendered against this appellant as a defendant. By service on an attorney it had never retained, the judgment herein charges this appellant with punitive damages of $1,000,000.00 Counsel was unable to find any law which justifies the punitive damage judgment against the party whose only connection with the matters complained of was on the grounds that it was an alter-ego. It is submitted that the finding of an alter-ego relationship between Community Churches of America and this appellant has no foundation in fact or even any evidence to that effect, let alone the rewarding of a judgment of $1,000,000.00 in punitive damages.

CONCLUSION

Here we have a default judgment taken against a corporation in a suit on contracts it was not a party to because of a void attempt at service of summons and complaint on an attorney who was never retained by this defendant, at an office he did not occupy, and receptionist not in his employ who told plaintiffs' process server she had no authority to accept service.

The appellant court brushed off the uncontested evidence that Mr. Garcin had never been retained to represent this defendant on the ground he had ostensible authority to represent all defendants. This was an erroneous statement because only the principal can give such authority. He can't give it to himself, and he never claimed to have received any authority from me, as president, or any other responsible officer (or agent) of the Voice of Americanism.

The decision of the Court of Appeal should be reviewed to permit this defendant to defend itself and to prevent a miscarriage of justice!

Respectfully submitted,

/s/ Raymond Tremaine
RAYMOND TREMAINE
Attorney for Appellant
Voice of Americanism

APPENDIX

(OPINION omitted here, same as Appendix D in this petition.)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 1 DATE: 01/29/87

Tremaine Raymond
159 S. Norton Ave.
Los Angeles, CA 90004

8015508

RE: Kendall, Walter H. Et Al.,
vs.
Community Churches of America, Etc., etal

2 Civil 8015508
Los Angeles No. NCC14282G

Jan 29 1987 PETITION FOR REHEARING DENIED (Three)

APPENDIX C

2nd Civil No.
B 0 1 5 5 0 8

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WALTER H. KENDALL, et al.,
Plaintiffs and Respondents,
vs.
W. S. McBIRNIE, et al.,
Defendants and Appellants.

L.A.S.C. No.
NCC 14282G

ON APPEAL FROM
A DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR REVIEW

COTKIN, COLLINS & FRANSCELL

DEBBY L. HOWELL, ESQ.

Suite 800
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Santa Ana, California 92701
(714) 835-2330

Attorney for Defendant and Appellant California Graduate School of Theology

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EXHIBIT "A" (Omitted here, same as App. D to Petition.)

DECISION FROM THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE, FILED: JANUARY 5, 1987.

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Engebretson & Company v. Harrison (1981)
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Warner Brothers Records, Inc. v. Goldenwest
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Statutes

California Code of Civil Procedure
§ 416.10 C-11, 12

2nd Civil No.
B 0 1 5 5 0 8

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WALTER H. KENDALL, et al.,
Plaintiffs and Respondents,
vs.
W. S. McBIRNIE, et al.,
Defendants and Appellants.

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and Appellant the CALIFORNIA GRADUTATE SCHOOL OF THEOLOGY hereby petitions for review of the decision filed in the Court of Appeal of the State of California, Second Appellate District, Division One, affirming the trial court's decision to sustain a 1.2 million dollar default judgment against Petitioner herein.

I.

ISSUES PRESENTED FOR REVIEW

1. Does Defendant's alleged awareness of a defectively served lawsuit confer jurisdiction to enter a 1.2 million dollar default judgment, in the absence of proper service of process?

2. Can a default, entered upon proof of service that is later proven to be defective, be sustained after the fact by reliance upon a prior ineffective service attempt?

3. Is evidence of an alleged agent's conduct sufficient to establish ostensible authority, in the absence of any evidence of the alleged principal's conduct?

II.

APPROPRIATENESS OF REVIEW

The above three issues are important questions of law. At all times, Plaintiffs had the ability to effectively invoke jurisdiction by complying with statutory methods for service of process. Instead, Plaintiffs' chose to ignore code requirements. Default was entered based upon documentary evidence showing service of the Summons and Complaint on June 20, 1984. Thereafter, a 1.2 million dollar default judgment was entered.

In subsequent attacks on jurisdiction, major defects in the June 20th service were established. These defects were miraculously cured by reliance upon an ineffective service attempt occurring almost two months prior to June 20, 1984. The "cure" was accomplished by finding ostensible authority from evidence of an alleged agent's conduct. No evidence of the principal's conduct was offered. Both lower courts justified the "cure" by assuming, without any evidentiary basis, that Petitioner herein had actual notice of the lawsuit.

The lower court's decision creates far reaching ramifications. California case law is clear that ostensible authority can only be created by the acts of the principal. Evidence of the alleged agent's statements and conduct is not dispositive. Moreover, a defendant's knowledge of a lawsuit cannot be presumed, in the absence of evidence, merely because newspaper articles are published about the lawsuit. Finally, a patently void default judgment cannot be cured after the fact, and two ineffective service attempts do not equal service of process sufficient to sustain jurisdiction.

III.

NATURE OF THE CASE

A. Procedural Posture

A 1.2 million dollar judgment was entered pursuant to default on May 13, 1985. This Petitioner filed a timely Notice of Appeal on July 22, 1985.

An unpublished opinion affirming the trial court's action was rendered by the Court of Appeal on January 5, 1987. A Petition for Rehearing was timely filed on January 20, 1987. Rehearing was denied on January 29, 1987.

Attached hereto as Exhibit "A" is the Court of Appeal's opinion.

B. Factual History

This is an action to collect on numerous promissory notes executed by W. S. McBirnie, as President of Community Churches of America, Inc. All twenty-four Plaintiffs loaned money to Community Churches of America, Inc., based upon representations allegedly made to them by the President and Pastor, W. S. McBirnie.

Petitioner herein, the CALIFORNIA GRADUATE SCHOOL OF THEOLOGY, was founded by W. S. McBirnie. However, Mr. McBirnie was not an officer or director of Petitioner.

The causes of action against Petitioner are for an accounting (Eighty-Eighth Cause of Action); a constructive trust (Eighty-Ninth Cause of Action) and recovery based upon the alter-ego doctrine (Ninetieth Cause of Action).

A default was entered on August 16, 1984, based upon a document showing proof of personal service on June 20, 1984. [Clerk's Transcript, page 181.]

On April 26, 1985, a Motion to Quash Service of Summons was heard and denied. Judgment of 1.2 million dollars was entered by default on May 13, 1985.

On June 21, 1985, Petitioner's Motion to Vacate Default Judgment as Void on its Face was denied. On appeal, the lower court's ruling was affirmed.

At Petitioner's Motion to Quash Service of Process, it was established that the person "personally" served on June 20, 1984, as a authorized agent of Petitioner, was not an authorized agent of Petitioner, but instead, the receptionist at the former office of Petitioner's alleged counsel. Lucy M. Williams was not the agent of Petitioner herein, nor is there any evidence to suggest that she was.

Plaintiffs contended that Lucy M. Williams was the agent of an attorney (Mr. Garcin), who in turn was allegedly the agent of Petitioner. Plaintiffs contended, and the lower court agreed, that service upon an alleged agent of an alleged agent of an alleged principal, was the same as service upon the alleged principal. The lower court so held, in spite of the alleged agent of the alleged agent's Declaration that she was *not* the agent of the alleged agent. [C.T. pgs. 316-317.]

The lower court buttressed its finding of effective service by reinterpreting, after the fact, circumstances occurring two months prior to the date of alleged service on Lucy M. Williams.

On April 24, 1984, Plaintiffs "delivered" a copy of the Complaint to Petitioner's alleged agent and attorney, Robert W. Garcin. Neither Plaintiffs or Mr. Garcin considered the April 24th "delivery" to be effective service of process. Mr. Garcin was subsequently advised by Plaintiffs that unless he signed an Acknowledgment of Receipt voluntarily subjecting Defendants

to the court's jurisdiction, Plaintiff would undertake proper service of process. Mr. Garcin did not sign and Plaintiffs' first, albeit unsuccessful, attempt to *serve* the Complaint occurred on June 20, 1984.

The lower court ruled that Mr. Garcin was the "ostensible agent" of Petitioner herein, after examining only evidence of Mr. Garcin's conduct. The lower court found Lucy M. Williams to be the "authorized agent" of Mr. Garcin, based solely upon the disputed Declaration of a process server. Finally, the lower court found that any inadequacies in service of process were cured because of Petitioner's actual knowledge of the lawsuit. Actual knowledge was inferred simply because Petitioner's founder, W. S. McBirnie, was quoted about the lawsuit in various newspaper articles.

IV.

CONCLUSION

A compelling need for review exists. Petitioner is currently under the burden of a 1.2 million dollar judgment entered after a default was erroneously taken. After-the-fact attempts to cure the default are insufficent and legally unsustainable.

WHEREFORE, Petitioner respectfully prays:

1. That this Honorable Court grant this Petition for Review;

2. For such other and further relief as this Honorable Court deems just and proper.

DATED: February 13, 1987

COTKINS, COLLINS & FRANSCELL

By: /s/ Debby L. Howell
DEBBY L. HOWELL
Attorneys for Defendant and
Appellant CALIFORNIA GRADUATE
SCHOOL OF THEOLOGY

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

I.

THE 1.2 MILLION DOLLAR DEFAULT JUDGMENT ENTERED AGAINST PETITIONER HEREIN IS VOID FOR LACK OF PERSONAL JURISDICTION

Code of Civil Procedure section 416.10 provides for service of process on a corporation:

> "A summons may be served on a corporation by delivering a copy of the summons and of the complaint:
>
> (a) To the person designated as agent for service of process . . .
>
> (b) To the president or other head of the corporation, . . . or *a person authorized by the corporation to receive service of process.*" [Emphasis added]

In the underlying proceedings, Mr. Garcin's authority to accept service of process on behalf of Petitioner herein was disputed. Lucy M. William's *lack of authority* to accept service of process on behalf of Petitioner herein was *undisputed.*

On June 20, 1984, eight copies of a summons and complaint were left with Lucy M. Williams. Lucy M. Williams refused the process server's request to sign a Notice and Acknowledgment of Receipt form.

The process server signed a document showing proof of personal service on Lucy M. Williams as the authorized agent of Petitioner, the CALIFORNIA GRADUATE SCHOOL OF THEOLOGY. This document was filed with the court and formed the sole basis for entry of a default against Petitioner.

If Lucy M. Williams was served as the authorized agent of Petitioner, service is patently defective, and yet evidence filed with the court shows just that. Lucy M. Williams was served as the "authorized agent" of the CALIFORNIA GRADUATE SCHOOL OF THEOLOGY. Once again, after the fact, the "obvious" was cured by a reinterpretation.

Plaintiffs contended and the Court of Appeal agreed, that Lucy M. Williams was not served as the authorized agent of Petitioner, rather, she was served as the authorized agent of Mr. Garcin, a non-party. The process server's Proof of Service clearly indicates otherwise. [Clerk's Transcript, page 181].

Basically, both lower courts did summersaults to uphold a default judgment. The only justification offered was Petitioner's presumed knowledge of the lawsuit. Yet, the underlying record is devoid of any evidence showing Petitioner's actual knowledge.

Assuming for purposes of argument only, that Petitioners did have actual knowledge, Petitioner respectfully submits that actual knowledge alone does not eliminate Plaintiffs' obligation to comply with statutory service provisions. In order to find effective service and proper jurisdiction, Plaintiffs must show at least "substantial" compliance with Code of Civil Procedure section 416.10. Even though service of process statutes are to be liberally construed, they have not been wiped off the books by judicial precedent.

Service upon the alleged agent of an alleged agent of a principal cannot fairly be equated with substantial compliance. "We are not dealing here with a minor detail but with an entirely incorrect mode of service." *Engebretson & Company v. Harrison*, 125 Cal.App.3d 436, 444 (1981). See also, *Schering Corporation v. Superior Court*, 52 Cal.App.3d 737, 741-42 (1975).

The evidence shows that Lucy M. Williams was served on June 20th as the authorized agent of Petitioner. After the fact,

it was determined that she was really served as the authorized agent of Mr. Garcin. Service upon the allegedly authorized agent of a non-party who was the allegedly authorized agent of a party was upheld because of actual knowledge. Additionally, an earlier transaction (on April 24, 1984) was interpreted as service on an alleged agent of the Petitioner, even though neither side to this litigation intended the April 24th transaction to be service or relied upon the April 24th transaction as service.

The procedural tangles that must be ignored in order to uphold jurisdiction are monumental. Contrary to the opinion of the Court of Appeal, a single "hypertechnicality" is not involved. This action involves several major instances of failure to comply with clearly delineated code provisions. Noticeably missing from the record is any reference to Plaintiffs' inability to accomplish effective service. Plaintiffs' chose to stand on June 20th service upon an individual allegedly the authorized agent of Petitioner. They should not now be allowed to reinterpret and reassemble the facts.

II.

SERVICE WAS NOT ACCOMPLISHED ON APRIL 24, 1984

Mr. Robert Garcin was the alleged agent of Petitioner, allegedly served on April 24, 1984. At the time, Plaintiffs did not *intend* to effect service on April 24, 1984. *After* April 24, Plaintiffs' acted as if it was still necessary to effect proper service. *After* April 24th, Mr. Garcin also acted as if it were still necessary to effect service. On and about April 24, 1984, both Plaintiffs and Petitioner herein understood that service of process would be accomplished in the future.

Plaintiffs' documented understanding of the April 24th transaction was dramatically changed after default was entered

(based upon June 20th service) and after it became evident that the June 20th service was defective. It is patently unfair to allow Plaintiffs to after-the-fact, reinterpret a prior transaction in an effort to sustain a default that is otherwise void on its face. More importantly, it is patently unfair for the court to accept a reinterpretation, clearly contradicted by evidence before the court, in order to uphold a 1.2 million dollar judgment by default.

Evidence before this court shows Plaintiffs' true understanding. Instruction to Plaintiffs' attorney service on April 24th are markedly different from instructions to the same attorney service on June 20th. [Clerk's Transcript, pages 237 and 241].

On April 24th, Plaintiffs' asked the attorney service to "deliver" (and not *serve) one* copy of a summons and complaint to Robert Garcin. Mr. Garcin did not acknowledge "service." Instead, he crossed out the word "served" next to his signature. Mr. Garcin merely acknowledged "receipt" of a delivery.

Approximately three weeks later, on May 18, 1984, Mr. Garcin advised Plaintiffs that "you may serve me on behalf of all Defendants, except Community Churches of America." [Clerk's transcript, page 240]. Importantly, Mr. Garcin did not acknowledge past service. He merely acknowledged his authority to receive service *in the future.*

Even more probative is correspondence from Plaintiffs' attorney to Mr. Garcin, dated May 14, 1984. [Clerk's Transcript, page 238]. Plaintiffs' May 14th correspondence confirms Plaintiffs' knowledge that service was not effectively accomplished on April 24th. Plaintiffs' attorney states:

> "If I do not hear from you, I will take appropriate steps either to have the complaint served or to have the court accept the service upon you as service upon the various Defendants . . ."

Plaintiffs did not take any steps to have the court "accept the service of [Mr. Garcin] as service upon the various

Defendants." Instead, Plaintiffs took appropriate steps to have the complaint "served" on June 20, 1984. Importantly, Plaintiffs' attorney does not state that he will attempt to *re-serve*, he merely states that he will undertake service. Clearly, Plaintiffs' attorney understood that proper service had not as yet been accomplished.

On June 20, 1984, Plaintiffs' attorney service was instructed to *serve* eight copies of a summons and complaint to Mr. Garcin personally, as service on behalf of eight listed Defendants. [Clerk's Transcript, page 241]. The attorney service was clearly instructed to "serve" rather than merely "deliver." In fact, the attorney service charged more for "service" than it did for mere "delivery."

The only reasonable inference is that Plaintiffs' attorney did not consider "delivery" on April 24th to be effective service of process.

Petitioner respectfully submits that the April 24th transaction does not cure the deficiencies of "service" on June 20th.

III.

ONLY THE ACTS OF A PRINCIPAL CAN CREATE AN OSTENSIBLE AGENCY

An "ostensible agency" was found twice in this action. Mr. Garcin was found to be the ostensible agent of Petitioner. Lucy M. Williams was found to be the ostensible agent of Mr. Garcin (although she was served as the authorized agent of Petitioner). In both instances, the agency was created based upon conduct of the alleged agent.

Lucy M. Williams, allegedly stated that she was authorized to accept service on behalf of Mr. Garcin. (Lucy disputes this in a sworn Declaration.) Mr. Garcin did state that he was the agent of Petitioner herein. Noticeably missing is any conduct from

Mr. Garcin leading Plaintiffs to believe that he cloaked Lucy M. Williams with the robe of an agent. More importantly, there is no evidence to suggest that Petitioner herein cloaked Mr. Garcin with the robe of agent "authorized to accept service of process." The lower courts had no evidence to support a finding of ostensible agency.

Under California law, agency is created by the acts of the principal and not the acts of the alleged agent. See *Pasadena Medi-Center Associates v. Superior Court*, 9 Cal.3d 773, 777-780 (1973).

The *Pasadena* case was cited by the Court of Appeal along with *Warner Brothers Records, Inc. v. Goldenwest Music Sales*, 37 Cal.App.3d 1012 (1974). In both cases, the court looked to conduct of the principal to determine the existence of an ostensible agency. Since the record herein is devoid of any evidence of conduct by the principal, then ostensible agency between either Lucy M. Williams and Mr. Garcin or Mr. Garcin and Petitioner herein, cannot properly be inferred.

IV.

PETITIONER INCORPORATES HEREIN BY REFERENCE THE PETITIONS AND POINTS AND AUTHORITIES SUBMITTED BY CO-APPELLANTS/PETITIONERS

V.

CONCLUSION

Petitioner herein is not asking for the court to reverse a default judgment based upon a single "hypertechnicality." Petitioner is asking this court to ignore after-the-fact interpretations and justifications and instead look at the evidence presented to the trial court entering default. It is only by jumping

through several hoops that the subsequent judgment of 1.2 million dollars can be upheld.

The evidence, contrary to subsequent contentions of Plaintiffs, shows:

1. On June 20th, Lucy M. Williams was served as the *authorized agent of Petitioner*.

2. Lucy M. Williams was *not* the authorized agent of Petitioner.

3. Default was entered based upon the June 20th service.

4. A default judgment was subsequently entered for 1.2 million dollars.

5. Neither party understood the April 24th transaction to be effective service.

Petitioner respectfully submits that jurisdiction cannot be upheld in light of the above documented facts. Accordingly, Petitioner requests that this court review this action and overrule the Court of Appeal.

DATED: February 13, 1987

COTKIN, COLLINS & FRANSCELL

By: /s/ Debby L. Howell
DEBBY L. HOWELL

Attorneys for Defendant and
Appellant CALIFORNIA GRADUATE
SCHOOL OF THEOLOGY

APPENDIX D

NOT TO BE PUBLISHED

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

WALTER H. KENDALL et al.,
Plaintiffs and Respondents,
v.
W. S. McBIRNIE et al.,
Defendants and Appellants

No. B015508
(Super.Ct.No.
NCC 14282G)

Court of Appeal-Second Dist.
FILED
January 5, 1987
Clay Robbins, Jr., Clerk

Deputy Clerk

APPEAL from an order and a judgment of the Superior Court of Los Angeles County. Robert P. Schifferman, Judge, and Florence-Marie Cooper, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Affirmed.

Raymond Tremaine; Scolinos & Dunne and Harry Frank Scolinos; Irsfeld, Irsfeld & Younger and Michael R. Younger; Cotkin, Collins, Kolts & Franscell and Raymond G. Kolts and Debby L. Howell for Defendants and Appellants.

Christ T. Troupis for Plaintiffs and Respondents.

Defendants appeal from the denial of their motion to vacate a judgment pursuant to Code of Civil Procedure 473[1] and from the default judgment. For the reasons stated below, we affirm the decision of the trial court.

[1] Unless otherwise stated, all statutory references are to the Code of Civil Procedure.

FACTS

Defendants, California Graduate School of Theology, United Community Church, W. S. McBirnie, Concord Senior Housing Foundation, and Voice of Americanism (hereinafter defendants), are various related corporations and one individual who borrowed money from plaintiffs to build a theological library. Suit was brought against them by a group of 24 individuals whom defendants refused to repay. Defendants do not dispute that they owe plaintiffs the money.

Plaintiffs are all represented in this action by Christ Troupis. On all matters dealing with the repayment of the loans Mr. Troupis dealt with Mr. Robert Garcin. Garcin asserted, orally and in writing, that he represented all the defendants except for one who was not a party to the motion to vacate or the appeal.

On April 23, 1984, Garcin communicated to Troupis that he was authorized to accept service on behalf of defendants. The next day a copy of the summons and complaint was delivered to Garcin. Garcin acknowledged receipt. In fact, a newspaper article published after this delivery quoted both Garcin and defendants about this case.

Garcin again stated he could be served on behalf of all defendants in a letter dated May 18, 1984.

Thus, on June 20, 1984, Troupis served eight copies of the summons on Garcin. These copies were served on the receptionist who advised the process server that she had been authorized by Garcin to accept service on his behalf.

Thereafter, when defendants did not answer, plaintiffs filed a request to enter default on August 16, 1984. Defendants then waited over eight months to file a motion to quash service of summons for lack of jurisdiction. At this hearing all defendants were represented by Garcin. This motion was denied.

After a prove-up hearing on the default, judgment was entered against all defendants on May 13, 1985. The court awarded

plaintiffs $165,825.63 in general damages, $55,109.32 in interest $268.00 costs, $12,842.05 in attorney's fees, and $1,000,000.00 in punitive damages.

Thereafter defendants moved to vacate the judgment as void on its face pursuant to section 473. Defendants contend that the court lacked jurisdiction because they were never served. The court denied the motion. Defendants now appeal from the denial of the motion to vacate the judgment and from the judgment.

DISCUSSION

The sole issue on this appeal is whether plaintiffs properly served defendants so that the court could acquire jurisdiction over defendants. For two separate and independent reasons, we hold that under the circumstances of this case defendants were properly served.

1. Service Under the Statute

Sections 416.10 through 416.90 govern "Persons upon whom summons may be served." Section 416.10 applies to corporations and section 416.90 applies to persons not otherwise specified, which includes individuals. Under both sections a summons may be served on an "authorized person" authorized by either the corporation or the individual. Plaintiffs contend that neither Garcin nor the receptionist were authorized to accept service and therefore the service was invalid.

In 1969 the rules relating to service of process were substantially updated and relaxed. "As stated by the draftsmen in the November 25, 1968 Report of the Judicial Council's Special Committee on Jurisdiction at pages 14-15: 'The provisions of this chapter should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question

of service should be resolved by considering each situation from a practical standpoint. . . .' [¶] The liberal construction rule, it is anticipated, will eliminate unnecessary, time-consuming, and costly disputes over legal technicalities, without prejudicing the right of the defendants to proper notice of court proceedings." (Li, Attorney's Guide to Cal. Jurisdiction and Process (Cont.Ed.Bar 1970) pp. 57-58.)

With this proviso in mind, we examine the sections as they apply to the different defendants. As to the individual defendant, W. S. McBirnie, section 416.90 governs service on an individual defendant and provides that a summons may be served on a person or "a person authorized by him to receive service of process." The Judicial Council's comment to section 416.90 states: "If process is delivered to an agent of defendant, such agent must be one who is authorized by law or by appointment to receive service of process, and the agent of an individual for other purposes is not necessarily authorized to receive such process."

As to the corporate defendants, section 416.10 governs service of summons upon the corporation. Section 416.10, subdivision (b), provides that service may be upon "the president or other head of the corporation, . . . *or a person authorized by the corporation to receive service of process.*" (Emphasis added.)

Both section 416.10 and section 416.90 have been interpreted to provide for service upon an agent who has either actual or ostensible authority. For example, in *Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1018-1019, the court held that service on the defendant's attorney with ostensible authority was proper service on the defendant consistent with the intent of the Judicial Council to interpret the statute liberally. Similarly, in *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 777, the Supreme Court held that a person listed as an officer of the corporation even though not an officer of the corporation had

ostensible authority to accept service on behalf of the corporation.

In the instant case, like the attorney of *Warner Bros. Records, Inc.*, Garcin had ostensible authority to accept service. After the first April delivery, newspaper articles quoted defendants as stating Garcin represented them in the pending lawsuit. Moreover, Garcin, without contradiction by any of the defendants, had told Troupis not once but twice in writing and orally that he had authority to accept service on behalf of all the defendants who are parties to this appeal. Thus we conclude that service upon Garcin was proper to confer jurisdiction over all defendants.

However, the harder question is whether service on the receptionist on behalf of Garcin constituted improper service of process. We find that under the facts of this case service was proper since all the defendants received actual notice and the receptionist was specifically authorized.

Not only Garcin but the parties themselves admitted the existence of the lawsuit. In various newspaper articles published before the June 20, 1984 service, both Garcin and the defendants discussed the lawsuit. In addition, the process server, in a sworn declaration, stated that the receptionist told him that Garcin authorized her to accept service on his behalf. Thus, we conclude that Troupis was justified in relying on the process server's statement that the receptionist was authorized.

By this decision we do not mean that in all cases where a receptionist is served on behalf of an attorney who is authorized to accept service on behalf of defendants that service will be proper. In the instant case, however, to allow defendants to vacate the judgment on hypertechnical grounds, would allow them to nullify the plaintiffs' claim that defendants admit is valid and of which they had actual notice. Thus, we conclude that service was proper and the trial court properly denied defendants' motion to vacate the judgment.

2. Service Outside of the Statute

Parties may agree to subject themselves to jurisdiction of the court without complying with the procedural requisites of service of process. (*National Rental v. Szukhent* (1964) 375 U.S. 311, 315-316.) Here, Garcin by agreeing to accept service of process on behalf of the defendants agreed to waive strict compliance with the statute. In effect he agreed to accept service in any reasonable manner Relying on Garcin's ostensible authority as discussed *supra,* plaintiffs not once but twice delivered and served copies of the summons and complaint upon Garcin. In addition, both Garcin and the plaintiffs acknowledged receipt of the summons and complaint and the existence of the lawsuit. As in *National Rental,* this is a case where the parties received actual notice. Therefore, we hold that service on the defendants was properly made on Garcin in a reasonable manner outside of the statute.

The order of the trial court denying defendants' motion to vacate the judgment as void on its face pursuant to Code of Civil Procedure section 473 is affirmed.

NOT TO BE PUBLISHED.

DEVICH, J.

We concur:

LUCAS, Acting P.J.

WOODS, J.*

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*Assigned by the Chairperson of the Judical Council.

APPENDIX E

2nd Civil No.
B 0 1 5 5 0 8

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT COURT
STATE OF CALIFORNIA
DIVISION ONE

WALTER H. KENDALL, et al.,
Plaintiffs and Respondents,
vs.
COMMUNITY CHURCHES OF AMERICA, INC., et al.,
Defendants and Appellants.

L.A.S.C. No.
NCC 14282G

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HON. ROBERT P. SCHIFFERMAN, JUDGE PRESIDING
HON. FLORENCE-MARIE COOPER, JUDGE PRO TEMPORE

APPELLANT'S OPENING BRIEF

RAYMOND TREMAINE

159 South Norton Avenue
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(213) 469-8780

Attorney for Appellant
VOICE OF AMERICANISM

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STATEMENT OF THE CASE

This is an appeal by the defendant, VOICE OF AMERICANISM, from a judgment of the Los Angeles County Superior Court in an action instituted by a group of twenty-four holders of promissory notes of the defendant, Community Churches of America, a California non-profit corporation, against that defendant and any other entity plaintiff could find who was acquainted with the defendant, Dr. McBirnie, including this appellant whose name the plaintiffs did not know. (Clk.Tr.p.1).

Defaults were entered September 7, 1984 against the defendants and judgment taken by default filed May 13, 1983.

The case was tried on March 29,1985 before a Court Commissioner (Clk.Tr.191) as a default case. Judgment was given for plaintiffs against all defendants based on the alter-ego theory for about $200,000 general damages and $1,000,000 punitive damages. (Clk.Tr.p.298. *See* also Clk.Tr.p.399).

Of record the defendants appeared specially to quash service of summons and complaint (Clk.Tr.198 & 209). Further, the attorney appearing for this appeal had never been retained. (The motion to quash was denied April 26, 1985 (Clk.Tr.260).

The defendants separately moved to set aside the default and the default judgment. The motion was denied.

STATEMENT OF FACTS

Under a permit from the California Commissioner of Corporations, the defendant, Community Churches of America, (hereinafter referred to as "CCA") issued a group of unsecured promissory notes. (Clk.Tr.p.159). Unfortunate investments and a lawsuit in which the plaintiff's attorney, in the instant case, was the attorney for the plaintiff, prevented the repayment of all said notes. The plainitffs became impatient and brought this lawsuit to collect unpaid balances of their notes.

This appealing defendant was suspected and charged with receiving property from the defaulting defendant (Clk.Tr.p.88).

Plaintiffs attempted to produce proof that this appellant was the alter-ego of the defendant Dr. W.S. McBirnie and received property from CCA in a conspiracy to defraud the plaintiff. No evidence was offered to prove any property had been transferred to CCA to this appellant.

The proof offered to support the alleged plaintiff's alter-ego theory was one witness (Dr. Robert Lewis Hubbard) who is a former dissident employee of defendant, United Community Church (Rep.Tr.p.12-13) that its pastor, Dr. McBirnie was also the news analyst for this appellant in its Voice of Americanism broadcasts.

The plaintiffs contend all defendants were served with summons and complaint by serving the attorney Mr. Garcin for CCA and Dr. McBirnie. The principal issue in this appeal is:

Was there service on any defendant including the defendants Mr. Garcin did not represent?

ARGUMENT

I.

SUMMONS AND COMPLAINT WERE NEVER LEGALLY SERVED. MR. GARCIN WAS NOT THE ATTORNEY FOR THE APPELLATE, VOICE OF AMERICANISM, AND NEVER WAS OR COULD ACCEPT SERVICE FOR IT

This appellant was never represented by Mr. Robert Garcin. The evidence of non-retention was never contradicted and he was never retained by this appellant to act as their counsel and there was no proof that Summons and Complaint was served in any other fashion either at its office or by service on any officer. (See Declaration of Raymond Tremaine. Clk.Tr.p. 390). Mr. Garcin was not an officer, employee or person designated for service of appellant Voice of Americanism.

II.

MR. GARCIN HAS NEVER CLAIMED TO REPRESENT VOICE OF AMERICANISM EXCEPT SPECIALLY IN A MOTION TO QUASH

Mr. Garcin never claimed to represent Voice of Americanism (Rep.Tr.p.28) (See Declaration of Raymond Tremaine, Clk.Tr. p.390) except a special appearance in a motion to court service of summons and complaint. The most that can be said is that he told counsel for plaintiffs telephone operator that he had authority to represent most of the defendants (Rep.Tr.p.28). Voice of Americanism, this defendant, was not specifically mentioned. He never stated that he would represent Voice of Americanism in this litigation and respondent has offered no evidence that he did.

III.

THERE WAS NO SERVICE ON MR. GARCIN SO THE TRIAL COURT NEVER HAD JURISDICTION OVER ANY DEFENDANT

The attempted service on Mr. Garcin was illegal, not in conformance with the Code of Civil Procedure §415.20 and §416.90.

IV.

IF SERVICE ON MR. GARCIN SHOULD BE HELD TO BE VALID AND BINDING ON THIS APPELLANT, THIS APPELLANT WOULD BE DEPRIVED OF HIS DAY IN COURT WITHOUT ANY FAULT OR KNOWLEDGE OF ITS OWN

CONCLUSION

This appellant adopts the arguments of the other appellants as to the adequacy of service on all defendants. The plaintiff's attorneys have contended that service was made by a process server delivering copies of the Summons and Complaint in a reception room of another entity, (Clk.Tr.p.200-203) after Mr. Garcin had previously moved to another office building (Clk.Tr.p.373-375) and even though the receptionist in question refused to accept service (see Declaration of Robert W. Garcin, (Clk.Tr.p.378), Eric Chase, (Clk.Tr.p.246). In addition to this appellants separate contention that even if this court considers such service good as to some defendants, there is utterly no evidence that he was or ever stated he was the attorney for Voice of Americanism. If he has said so, his statement being that of a stranger, would not create a representation.

Respectfully submitted,

RAYMOND TREMAINE,

Attorney for Appellant
Voice of Americanism

APPENDIX F

2nd Civil No.
B 0 1 5 5 0 8

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT COURT
STATE OF CALIFORNIA
DIVISION ONE

WALTER H. KENDALL, et al.,
Plaintiffs and Respondents,

vs.

COMMUNITY CHURCHES OF AMERICA, INC., et al.,
Defendants and Appellants.

L.A.S.C. No.
NCC 14282G

APPEAL FROM
SUPERIOR COURT OF LOS ANGELES COUNTY
HON. ROBERT P. SCHIFFERMAN, JUDGE PRESIDING
HON. FLORENCE-MARIE COOPER, JUDGE PRO TEMPORE

APPELLANT'S OPENING BRIEF

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OF THEOLOGY

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QUESTION PRESENTED

I. **IS THE $1.2 MILLION DEFAULT JUDGMENT ENTERED AGAINST APPELLANT HEREIN VOID FOR LACK OF PERSONAL JURISDICTION?**

STATEMENT OF THE CASE

This is an appeal from a $1.2 million default judgment entered pursuant to a complaint that was never properly served.

Appellant herein, California Graduate School of Theology, is a California corporation. Personal jurisdiction over a California corporation can be obtained in one of two ways.

Respondents could have personally served Appellant's designated agent or "a person authorized" by Appellant to receive service of process. (Code of Civil Procedure §416.10(a) and (b))

Alternatively, Respondents could have effected substituted service by leaving the summons and complaint at the office of an "authorized person" *and* thereafter mailing a copy to the "authorized person". Personal jurisdiction would have existed on the tenth day after mailing. (Code of Civil Procedure §415.20(a))

Neither of the above two procedures were utilized by Respondents. Appellant's designated agent was not *personally served* nor was "a person authorized by the corporation to receive service of process" *personally served.* Moreover, a copy of the summons and complaint was not *left at the office* of an "authorized person," nor was a copy of the summons and complaint *thereafter mailed* to an "authorized person." Instead, Respondents delivered the summons and complaint to a receptionist at the former office of Appellant's former counsel.

Prior to the filing of the complaint and early in the subsequent proceedings, Appellant herein was represented by Robert W. Garcin, an attorney with the law firm of Irsfeld, Irsfeld &

Younger. Respondents contended below that Mr. Garcin was "a person authorized by the corporation to receive service of process" within the meaning of C.C.P. §416.10(b). Appellant specifically denied this contention. *Importantly*, however, it is *not* necessary to resolve this factual dispute (or to review the trial court's resolution) in order to find that personal jurisdiction over Appellant was never obtained.

Assuming, for the purposes of this appeal only, that Robert Garcin was an "authorized person," lack of jurisdiction is manifest from all documents contained in this record on appeal. Respondents could have personally served Robert Garcin as Appellant's authorized agent pursuant to C.C.P. §416.10(b). They did not. (The proof of service returned to the court shows personal delivery on Lucy M. Williams, a receptionist.) [Clerk's transcript, page 181]

Alternatively, Respondents could have left a copy of the summons and complaint at Mr. Garcin's office and thereafter mailed a copy to Mr. Garcin. They did not. (The failure to "thereafter mail a copy" is undisputed. Moreover, a copy was "left" at the *wrong office*.)

Instead of following either of the two statutorily sanctioned procedures, Respondents delivered the summons and complaint to a receptionist at the former location of Mr. Garcin's office. Substituted service was allegedly effected on June 20, 1984. Approximately 10 days prior thereto, Mr. Garcin and his entire firm relocated to a different address. [Clerk's transcript, pages 316-317] (The receptionist who received the summons and complaint worked in what is commonly known as a "Fegen suite." Mr. Garcin and his law firm left the Fegen suite arrangement to open offices elsewhere.

Under the circumstances, it is clear that personal jurisidiction was never obtained over Appellant herein. At best, Respondents can establish personal jurisdiction over Lucy M. Williams, an unnamed individual. They do not contend, nor could they, that Lucy Williams was Appellant's authorized agent. And yet, the proof of service upon which default was entered shows just that. Lucy Williams is identified as the

person authorized to accept service on behalf of *Appellant* and not Appellant's alleged agent, Mr. Garcin. [Clerk's transcript, page 181]

Now, after the fact, Respondents are contending that Lucy Williams was authorized to accept service on behalf of Mr. Garcin. Mr. Garcin, however, was not a defendant, he was allegedly an "authorized person." Personal service on an alleged agent of an allegedly "authorized person" is patently insufficient to confer jurisdiction. Accordingly, the default judgment which was subsequently entered is void on its face.

FACTS

The following facts are beyond dispute,

The complaint was filed on April 13, 1984 [Clerk's transcript, page 1].

On June 20, 1984 personal service was attempted on Robert W. Garcin, Esq., as a "person authorized" by Appellant herein to accept service. Because Mr. Garcin was absent, the summons and complaint were delivered to a receptionist, Lucy M. Williams, as the "person authorized to accept service" on behalf of Appellant herein. Lucy Williams was handed documents at an office located at 225 West Broadway, Suite 500. [Clerk's transcript, pages 141 and 241]

On June 20, 1984, Mr. Garcin's office was located at a different street address. The move from 225 West Broadway, Suite 500, was accomplished approximately 10 days prior to June 20, 1984. [Clerk's transcript, pages 316-317]

On August 16, 1984 Respondents filed a request to enter default against Appellant herein, *inter alia*. [Clerk's transcript, page 175] Default was entered pursuant to the returned proof of service showing personal delivery on June 20, 1984 on Lucy M. Williams as "person authorized to accept service" within the meaning of C.C.P. §416.10. [Clerk's transcript, page 181]

ARGUMENT

I.

THE LOWER COURT ERRED IN FINDING EFFECTIVE SERVICE ON APPELLANT HEREIN

A. Jurisdiction Over Appellant Was Never Obtained Because of Defective Service

Code of Civil Procedure §416.10 provides in pertinent part as follows:

> "A summons may be served on a corporation by delivering a copy of the summons and of the complaint:
> "(a) to the person designated as agent for service of process. . .;
> "(b) to . . . a person authorized by the corporation to receive service of process . . ."

Respondents did not serve Appellant's designated agent for service of process. (§416.10(a)) Instead, they unsuccessfully attempted to serve a person authorized by the corporation to receive service of process (§416.10(b)).

The only proof of service filed with the court shows that the summons and complaint were hand delivered to Lucy M. Williams. Ms. Willaims is described on the proof of service as the "person authorized to accept service" on behalf of California Graduate School of Theology, pursuant to C.C.P. §416.10. [Clerk's transcript, page 181]

Respondents have never contended that Lucy M. Williams is a person authorized by *Appellant* to accept service of process. Their only contention throughout the underlying proceedings has been that Mr. Garcin, Appellant's former attorney, was authorized to accept service of process. Conspicuously absent from the court file is a proof of service showing that Mr. Garcin was personally served as a person authorized by Appellant.

Accordingly, a default judgment was entered against appellant based upon a document showing personal delivery on a receptionist who admittedly had no authority from Appellant to accept service of process. In fact, the receptionist had no connection whatsoever with Appellant herein.

After the fact, Respondents offered parol evidence to contradict a clear, plain and unambiguous declaration made by a process server under penalty of perjury as proof of service on Appellant. [Clerk's transcript, page 181] Respondents raised the novel contention that contrary to the process server's declaration, Lucy Williams was *not* served as *Appellant's* agent, rather, she was served as a person authorized to accept service by Mr. Garcin, another person allegedly authorized to accept service on behalf of a corporation that already had a different designated agent for service of process.

Appellant is unaware of any statutory authority sustaining jurisdiction based upon service on an agent of an agent of a defendant. Appellant respectfully submits that jurisdiction cannot be sustained with service on an agent once removed. It is a clear miscarriage of justice to allow a $1.2 million default judgment to stand in a case where Respondents could have easily, but did not, effect *proper service*.

Code of Civil Procedure §415.20 provides in pertinent part as follows:

> "(a) In leiu of personal delivery of a copy of the summons and of the complaint to the person to be served as specified in §416.10 . . . a summons may be served by leaving a copy of the summons and of the complaint during usual office hours in his office with the person who is apparently in charge thereof, *and by thereafter mailing a copy* of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is

> deemed complete on the 10th day after such mailing." (Emphasis added.)

Respondents alternatively contend that service upon Appellant was effectuated pursuant to C.C.P. §415.20(a) above. Again, assuming for purposes of this appeal only that Mr. Garcin (Appellant's former counsel) was a "person authorized" by Appellant to accept service, Respondents could have utilized the above code provision by leaving a copy of the summons and complaint at Mr. Garcin's business office *and thereafter* mailing a copy to Mr. Garcin at that same business office.

The evidence is clear that Respondents did not complete either of the above two requirements. The summons and complaint were left with the receptionist (Lucy) located at 225 West Broadway. Various law firms did maintain offices at this location. Mr. Garcin and his law firm did not. The statement in Lucy M. Williams' declaration (under penalty of perjury) that Mr. Garcin and his entire law firm moved approximately 10 days prior to the attempted service is undisputed. [Clerk's transcript, pages 316-370]

On June 20, 1984, the date indicated on the proof of service returned to the court, Mr. Garcin's business office was no longer located at 225 West Broadway. Mr. Garcin's office was located at 100 West Broadway. A copy of the summons and complaint were left at the *wrong place*. Appellant respectfully submits that this fact is not a mere technicality that can be ignored by the court in light of the $1.2 million default judgment subsequently entered.

Additionally, Respondents failed to comply with the second requirement. They did not "thereafter" mail a copy of the summons and complaint to Mr. Garcin, either at his correct address or at the wrong address. Conspicuously lacking from the transcript on appeal is any evidence of mailing after attempting to leave a copy at Mr. Garcin's office. Jurisdiction does not exist on the date copies are left at the office. The Code clearly provides that jurisdiction exists on the *tenth day after mailing copies* of documents left at the business office. The ten-day period has never begun to run against Appellant

herein. Moreover, it is clear from the face of the proof of service filed in support of the default judgment that Respondents relied upon personal service pursuant to C.C.P. §416.10 instead of substituted service authorized by C.C.P. §415.20. Under Item 8 of the proof of service boxes are X'd showing *personal delivery* pursuant to C.C.P. §416.10. [Clerk's transcript, page 181]

A $1.2 million default judgment was entered based upon a proof of service declaring service under a particular statutory provision. It is crystal clear that service under that provision was incomplete or unsuccessful. Respondents would now have this court, after the fact, alter the basis for the default judgment. Yet, the "new facts" allegedly supporting a prior entry of default are also insufficient to establish effective service. Appellants respectfully submit that the $1.2 million default judgment cannot be justified in light of the clear and unambiguous documents on file herein. Accordingly, it is requested that the default judgment be set aside.

B. Absent Jurisdiction, The Default Judgment Entered Is Void

A trial court exceeds its jurisdiction when it enters a default judgment against defendants who have never been properly served with the complaint. Such a judgment is void on its face and can be attacked at any time.

> "A judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever."

Nagel v. P&M Distributors, Inc., 273 Cal.App.2d 176,180 (1969). See also *Plotitsa v. Superior Court*, 140 Cal.App.3d 755, 759-760 (1983).

Under California law, this court is empowered to set aside a patently void judgment.

> "In any event, when a judgment on the face of the judgment roll is void, attack can be made upon it at any time; the court has the right and power any time to vacate a void entry of default and a void default judgment."

Eagle Electric Manufacturing Company v. Keener, 247 Cal.App.2d 246, 250 (1966).

C. Appellant Did Not Confer General Jurisdiction By Moving To Quash Service of Summons

On April 26, 1985 Appellant herein specially appeared in the court below and moved to quash service of summons. [Clerk's transcript, pages 198-216] Appellant's special appearance did not confer general jurisdiction.

> "If a defendant has been served with process and he claims defects in the service and lack of jurisdiction of the court over his person, he must do so by special appearance for the purpose of moving to quash summons."

Nelson v. Horvath, 4 Cal.App.3d 1, 4 (1970).

> "Whether an appearance was general or special is determined by the relief sought and if a defendant, by his appearance, insists only upon the objection that he is not in court for want of jurisdiction over his person, and confines his appearance for that purpose only, then he has made a special appearance . . ."

Pease v. City of San Diego, 93 Cal.App.2d 706, 710-711 (1949).

Jurisdiction over a defendant who has not been properly served with process is not conferred by that party's appearance in court for the sole purpose of moving to quash improper service. It is clear from the record that Appellant's limited and special appearance was solely for purposes of contesting personal jurisdiction. Accordingly, the inadequacies in

Respondent's attempted service were not cured by Appellant's special appearance before the lower court.

II.

CONCLUSION

The proof of service filed by Respondents on August 16, 1984 in support of their request for a default was clearly defective and insufficient. Respondents knew, at all times, that Lucy M. Williams was not an agent authorized by Appellant herein to accept service of process. Their sole contention was that Mr. Garcin was an agent authorized to accept service of process. Respondents have not presented to this court or the lower court a valid proof of service upon Mr. Garcin as the authorized agent of Appellant herein.

The proof of service filed by Respondents contradicts the oral allegations made by respondents in the court below. In order to support the default judgment, the lower court had to ignore a clear and unambiguous proof of service, signed under penalty of perjury, and combine various irrelevant facts and contentions. The default judgment was erroneously justified below by a very tortured line of reasoning.

In light of the huge dollar amount at stake ($1.2 million) and in light of the fact that it was well within Respondents' ability to properly serve such a lengthy and allegedly meritorious complaint, it is respectfully submitted that the equities in this case compel a reversal. Respondents will have lost nothing. They will still be able to properly serve their complaint and litigate on the merits and Appellant will obtain what it has to date been unfairly deprived of -- the right to insist upon compliance with the statutory requirements that are compulsary conditions precedent to state court jurisdiction over Appellant and its assets.

DATED: July 4, 1986

COTKINS, COLLINS, KOLTS & FRANSCELL

By: /s/ Debby L. Howell
DEBBY L. HOWELL
Attorneys for Defendant/
First Appellant,
CALIFORNIA GRADUATE
SCHOOL OF THEOLOGY

APPENDIX G

SUPERIOR COURT OF CALIFORNIA,
COURT OF LOS ANGELES
DEPT. NC D

DATE July 12, 1985
HONORABLE Robert P. Schifferman Judge
HONORABLE Judge Pro Tem
C. Booth Deputy Sheriff
A. Fisher Deputy Clerk
Kathy Colby Reporter
(Parties and counsel checked if present)

9:45AM NCC 14282 G
WALTER H. KENDALL ET AL.,
vs.
COMMUNITY CHURCHES OF AMERICA,
etc., et al.,

Counsel for Plaintiff Popeney Lebetsamer & Troupis
by: Chris Troupis √
Raymond Tremaine, √
for Voice of Americanism

Counsel for Defendant Irsfeld, Irsfeld & Younger
for Untd Community Churches;
McBirnie; Concord Senior Housing
by: Michael Younger √
Greene, O'Reilly, Broillet, etc.,
for Untd Community Church
by: William N. McMillan √
Cotkin, Collins, Kolts, Franscell,
for California Graduate School
by: Raymond G. Kolts √

NATURE OF PROCEEDINGS:
#1: Motion of defendant Voice of Americanism for order vacating a default and vacating a default judgment;

#2: Motion of defendants W.S. McBirnie, United Community Churches of America, Inc., and Concord Senior Housing Foundation to Vacate default judgment as void on its face; to set aside entry of default;

#3: Motion of defendant United Community Church to set aside default and default judgment;

#4: Motion of defendant California Graduate School of Theology to vacate default judgment as void on its face.

Matters are argued and each motion is taken under submission by the court.

LATER: the Court now renders its ruling on the matters taken under submission:
#1, 2, 3 and 4: each motion is denied.

Certificate of Mailing is executed and filed this date.

(Irrelevant portion of court form omitted in printing)

MINUTES ENTERED
DEPT. NC D JULY 12, 1985
COUNTY CLERK

APPENDIX H

SUPERIOR COURT OF CALIFORNIA,
COURT OF LOS ANGELES
DEPT. NC G F

DATE May 6, 1985
HONORABLE Florence-Marie Cooper Judge Pro Tem
Pat Cook Deputy Sheriff
J. Estes Deputy Clerk
NONE Reporter
(Parties and counsel checked if present)

NCC 14282 G
WALTER KENDALL, ET AL

MCBIRNIE, W.S., ET AL

Counsel for Plaintiff Popeney Lebetsamer & Troupis
by: C. Troupis

Counsel for Defendant

NATURE OF PROCEEDINGS:
The matter came on for trial on April 29, 1985, the default for defendants having been entered August 16, and September 26, 1984. Oral and documentary evidence having been presented and considered by the court, the matter was taken under submission. The court now finds and rules.

Plaintiffs are entitled to judgment against defendants and each of them, jointly and severally, in the following amounts: General Damages, $165,825.63; Attorney's Fees, $12,842.05; Interest, $55,109.32; Costs, $268.00; Punitive Damages, $1 million. Punitive damages are to be divided among the plaintiffs in the ratio which their individual monetary recovery bears to the total general damages award.

Counsel for plaintiffs is instructed to prepare a Judgment consistent with the foregoing minute order.

Parties are notified this date via U.S. Mail as follows:

Popeney, Lebetsamer & Troupis
23545 Crenshaw Blvd.
Suite 204
Torrance, CA 90505

MINUTES ENTERED
DEPT. NC G F 5-6-85
COUNTY CLERK

MINUTE ORDER